

No. 1-12-2479

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

NAVIGATORS INSURANCE COMPANY,)
)
 Plaintiff-Appellee,) Appeal from
) the Circuit Court
) of Cook County.
 v.)
) No. 11 CH 21012
)
 NORTHERN BUILDERS, INC. and WEST)
 BEND MUTUAL INSURANCE COMPANY,) Honorable
) Rita M. Novak,
 Defendants- Appellants.) Judge Presiding.

JUSTICE QUINN delivered the judgment of the court.
Presiding Justice Harris and Justice Simon concurred in the judgment.

ORDER

¶ 1 *HELD:* Based on the terms agreed to by the respective parties in both their contracts and in their respective insurance policies, West Bend’s insurance coverage procured by subcontractor, Arlington Structural Steel Company, Inc. and Navigator’s insurance coverage procured by subcontractor, Weldex, Inc. provide concurrent primary coverage for the general contractor, Northern Builders, Inc. Therefore, Navigators Insurance Co. owes a duty to defend the general contractor, Northern Builders, Inc. along with West Bend Mutual Insurance Co. on a *pro rata* basis in a negligence action brought by a Weldex, Inc. employee against Northern Builders, Inc.

¶ 2

I. INTRODUCTION

¶ 3 This declaratory judgment action filed by plaintiff, Navigators Insurance Company (Navigators), arose out of a personal injury lawsuit that was filed by Darren Beuder and his wife, Krystal Beuder, against the general contractor, Northern Builders, Inc. (Northern Builders), and a subcontractor, Arlington Structural Steel Co., Inc. (Arlington), seeking damages for injuries Darren Beuder received while he was working on a construction site of his employer and a subcontractor, Weldex, Inc. (Beuder v. Northern Builders, Inc., No. 10 L 006795, Circuit Ct. of Cook County, Law Div.) Northern Builders looked to both Navigators insurance policy procured by Weldex, Inc. and a West Bend Mutual Insurance Company (West Bend) insurance policy procured by Arlington to provide Northern Builders with primary defensive coverage in the Beuders' lawsuit. Plaintiff, Navigators, sought through the instant lawsuit a declaration that it did not owe primary insurance coverage to Northern Builders under the insurance policy with subcontractor, Weldex, Inc., arguing that it provided only excess coverage for Northern Builders in the Beuder negligence lawsuit. Cross-motions for summary judgment were filed by the parties regarding the priority of coverage issues concerning the insurance policies issued by Navigators and West Bend and a hearing was held on the substance of the parties' briefs. The circuit court ruled in favor of Navigators and held that: (1) West Bend owes a duty to defend Northern Builders in the Beuders' lawsuit; (2) Navigators owes no duty to defend Northern Builders until the West Bend insurance policy is exhausted; and (3) the terms of the Navigators insurance policy procured by Weldex, Inc. does not allow Northern Builders to force Navigators to share concurrently with West Bend in the cost of Northern Builders' defense as a primary insurer. This timely joint appeal pursuant to Supreme Court Rule 303 was filed by

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defendants, Northern Builders and West Bend, seeking to reverse the circuit court's order granting summary judgment in favor of Navigators. A joint appellate brief was filed by Northern Builders and West Bend. For the following reasons, we reverse.

¶ 4

II. RELEVANT FACTS

¶ 5 Defendant, Northern Builders, was a general contractor on a construction project located in Bridgeview, Illinois. Northern Builders entered into a subcontract with Arlington Structural Steel Company, Inc. (Arlington) to provide steel work on that project. The subcontract between Northern Builders and Arlington required Arlington to name Northern Builders as an additional insured on its general liability insurance policy issued by West Bend and that such coverage was to be primary coverage. Arlington then subcontracted with Weldex, Inc. (Weldex) to provide work for a metal deck on the construction project. The subcontract between Arlington and Weldex required that Weldex name both Arlington and Northern Builders as additional insureds under its general liability insurance policy issued by Navigators. The insurance rider to that contract stated that Weldex "shall name Arlington Structural Steel Company, Inc, the General Contractor [Northern Builders] [and others] as Additional Insureds on [Weldex's] General Liability, Umbrella and Excess Liability policies and such insurance must be primary and non-contributory coverage." The contract between the two subcontractors, Arlington and Weldex, also provided that Weldex "shall have his policies endorsed to read as follows: 'The Additional Insured's own coverage is excess to that provided by insured's policy. The liability of the insured under [Weldex's] policy is not reduced by the existence of Additional Insured's own coverage.'"

¶ 6 In December 2009, an employee of Weldex, Darren Beuder, was injured while working on

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the construction project. Both Darren Beuder and his wife filed a complaint against the general contractor, Northern Builders, and the subcontractor, Arlington, for negligence and other claims. Northern Builders notified both Navigators (Weldex's insurance carrier) and West Bend (Arlington's insurance carrier) that Northern Builders was an primary additional insured under their respective insurance policies and that they owed a duty to defend and indemnify Northern Builders with respect to the Beuders' lawsuit.

¶ 7 West Bend has acknowledged that Northern Builders is a primary additional insured under the policy of insurance that West Bend issued to Arlington. West Bend is currently providing Northern Builders with a defense in the Beuders' lawsuit.

¶ 8 While Navigators acknowledged that Northern Builders qualifies as an additional insured under the policy it issued to Weldex, it maintains that its policy is excess coverage over the primary coverage provided by the West Bend policy issued to Arlington under which Northern Builders also qualifies as an additional insured.

¶ 9 In this case we are concerned with the contract between Northern Builders and Arlington which required Arlington to provide primary insurance for Northern Builders, the contract between Arlington and Weldex which also required Weldex to provide primary insurance to Northern Builders, and the language of the two insurance contracts issued to the two subcontractors Arlington and Weldex by their respective insurance providers, West Bend and Navigators.

¶ 10 West Bend issued a commercial general liability policy to Arlington for one year (June 1, 2009 through June 1, 2010) with a \$1 million limit of liability for each occurrence. The West Bend policy contains an Additional Insured Contractor's Blanket Endorsement (AI Endorsement) which

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reads, as follows:

“This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY PART

A. WHO IS AN INSURED (Section II) is amended to include as an additional insured any person or organization whom you are required to add as an additional insured on this policy under this written contract or written agreement.

* * *

B. The insurance provided to the additional insured is limited as follows:

1. That person is only an additional insured with respect to liability arising out of:

* * *

- b. ‘Your work’ for that additional insured; or
- c. Acts or omissions of the additional insured in connection with the general supervision of ‘your work.’ ”

West Bend Commercial General Liability Insurance Policy issued to Arlington No. CPA 1084633.

¶ 11 Section IV - COMMERCIAL GENERAL LIABILITY CONDITIONS of the West Bend

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insurance policy issued to Arlington also provided, as follows:

“4. Other Insurance

If other valid and collectible insurance is available to the insured for a loss we cover ***under Coverage A or B of this coverage part, our obligations are limited as follows:

a. Primary Insurance

This insurance is primary except when paragraph b. below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in paragraph c. below.

b. Excess Insurance

(1) This insurance is excess over:

(a) Any of the other insurance, whether primary, excess, contingent or on any other basis:

(i) That is Fire, Extended Coverage, Builder’s Risk, Installation Risk or similar coverage for ‘your work’:

(ii) That is Fire Insurance for premises rented to you or temporarily occupied by you with permission of the owner;

(iii) That is insurance purchased by you to cover your liability as a tenant for ‘property damage’ to premises rented to you

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or temporarily occupied by you with permission to the owner; or

(iv) If the loss arises out of the maintenance or use of aircraft, 'autos' or watercraft to the extent not subject to Exclusion g. of Section I - Coverage A - Bodily Injury And Property Damage Liability.

(b) Any other primary insurance available to you covering liability for damages arising out of the premises or operations, or the products and completed operations, for which you have been added as an additional insurance by attachment of an endorsement.

(2) When this insurance is excess, we will have no duty under Coverage A or B to defend the insured against any 'suit' if any other insurer has a duty to defend the insured against that 'suit'. If no other insurer defends, we will undertake to do so, but we will be entitled to the insured's rights against all those other insurers."

West Bend's Commercial General Liability Coverage Form CG 00 01 12 07.

¶ 12 With respect to the West Bend coverage provided under the AI Endorsement, paragraph 4

(b) listed above in its entirety, was amended with the addition of the following:

"4. Other Insurance

b. Excess Insurance

This insurance is excess over:

Any other valid and collectible insurance available to the additional

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insured whether primary, excess, contingent or any other basis unless a written contract specifically requires that this insurance be either primary or primary and noncontributing. Where required by written contract, we will consider any other insurance maintained by the additional insured for injury or damage covered by this endorsement to be excess and noncontributing with this insurance.

When this insurance is excess, as a condition of coverage, the additional insured shall be obligated to tender the defense and indemnity of every claim or suit to all other insurers that may provide coverage to the additional insured, whether on a contingent, excess or primary basis.”

West Bend AI Endorsement.

¶ 13 Navigators issued a commercial general liability insurance policy to the subcontractor, Weldex, on the construction project. The language in Navigator’s insurance policy under which Northern Builders qualifies as an additional insured is contained in their AI Endorsement and states, in pertinent part, as follows:

“ADDITIONAL INSURED - OWNERS, LESSEES OR CONTRACTORS - AUTOMATIC STATUS WHEN REQUIRED IN CONSTRUCTION AGREEMENTS WITH YOU

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

* * *

A. **Section II - Who Is An Insured** is amended to include as an insured the person or organization shown in the schedule, but only with respect to liability arising out of your ongoing operations performed for that insured.

* * *

C. As respects the additional insureds covered by this endorsement, **Section IV - Commercial Liability Conditions, Paragraph 4 - Other Insurance, Part a.** is amended to read: ‘With respect to a policy of insurance issued to the additional insured hereunder as a *named insured* this insurance is primary and non-contributory. With respect to other policies of insurance under which the additional insured hereunder qualifies as an additional insured, this insurance is excess.’ (Emphasis in original)

Navigator’s AI Endorsement, CG 20 10 10 01- NAV(11-07)).

¶ 14 Navigator’s policy condition for “Other Insurance” set forth in Section IV - Commercial General Liability Conditions is identical to the “Other Insurance” condition contained in the West Bend policy.

¶ 15 The parties filed cross-motions for summary judgment. In the parties dispute as defined and argued in their briefs, the circuit court was to determine the priority of insurance coverage and whether the “other insurance” clauses in the Navigator and West Bend AI Endorsements provided

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for primary or excess coverage. The circuit court ruled in favor of Navigators' position that it provided excess coverage and West Bend's coverage was primary and granted summary judgment in Navigators' favor. In its opinion, rendered in open court on July 24, 2012, the circuit court held that the "other insurance" clause in West Bend's AI Endorsement applied as primary coverage because the endorsement stated that the insurance was excess unless a written contract specifically required primary insurance. The court found that the plain meaning of the written contract between Northern Builders and Arlington required primary insurance coverage for Northern Builders and, therefore, West Bend's insurance policy provided primary coverage to Northern Builders. The circuit court also found that Navigators' insurance policy provided excess coverage and, therefore, the West Bend policy must be exhausted before Navigators' excess coverage is triggered. Both Northern Builders and West Bend filed a joint notice of appeal and a joint appellate brief which requests this court to reverse the circuit court's grant of summary judgment in favor of Navigators and against Northern Builders and West Bend.

¶ 16

III. STANDARD OF REVIEW

¶ 17 Circuit court orders granting summary judgment pursuant to 735 ILCS 5/2-1005 (c) (West 2010) are given *de novo* review by reviewing courts. *General Casualty Insurance Co. v. Lacey*, 199 Ill.2d 281, 284 (2002). A circuit court's determination of an insurance contract provision is given *de novo* review. *Pekin Insurance Co. v. Wilson*, 237 Ill. 2d 446, 455 (2010). Therefore, this court will look to the entire case, *de novo*.

¶ 18

IV. ANALYSIS

¶ 19

A. Introduction

¶ 20 Both West Bend and Navigators agree that Northern Builders is an additional insured under their respective insurance policies that they issued to the subcontractors, Arlington and Weldex. Although Northern Builders, the general contractor, has its own commercial general liability policy insurer, neither West Bend nor Navigators argue that Northern Builders' insurer should step in to defend or indemnify Northern Builders in the negligence lawsuit filed by the Beuders. This case concerns only the priority of insurance coverage as between West Bend's and Navigators' insurance policies issued to the two subcontractors, Arlington and Weldex, whose respective contracts required that Northern Builders be named as an additional insured in their respective insurance policies and that such coverage be primary coverage.

¶ 21

B. The “Other Insurance” Clauses and Priority of Coverage

¶ 22 In Illinois, priority of coverage between two insurance policies is dictated by the terms of the “other insurance” clauses in the policies. *Putman v. New Amsterdam Casualty Co.*, 48 Ill. 2d 71, 76-77 (1970). Our supreme court has held that, whenever possible, “other insurance” clauses in competing policies should be reconciled to effectuate the intent of the parties. *Id.*

¶ 23

Navigators argues that the “other insurance” clause contained in its AI Endorsement was an excess “other insurance” clause and that West Bend’s AI Endorsement contained a primary “other insurance” clause. West Bend agrees that Navigators' policy contained an excess “other insurance” clause, but argued that its own endorsement is an excess “other insurance” clause, as well. How the “other insurance” clauses in the two policies are characterized — as either primary or excess —

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determines the outcome in this case. “When two policies contain the same sort of ‘other insurance’ clause, the clauses will be deemed incompatible” and the coverage will be prorated between the two insurance policies. *Putnam v. New Amsterdam Casualty Co.*, 48 Ill. 2d 71, 76-77 (1970). However, where one insurance policy contains a primary “other insurance” clause and the other insurance policy contains an excess “other insurance” clause, the insurance company with the excess “other insurance” clause is treated as providing excess coverage. In such an instance, the insurance company providing excess coverage is held liable only after the insurance company with the primary “other insurance” clause has exhausted its policy limits. *Indiana Insurance Co. v. Powerscreen of Chicago, Ltd.*, 2012 IL App (1st) 103667 ¶ 39; *State Farm Fire and Casualty Co. v. Utica National Insurance Group*, 375 Ill. App. 3d 230 (2007); *United States Fire Insurance Co. v. Aetna Life and Casualty Co.*, 291 Ill. App. 3d 991, 1002 (1997).

¶ 24 Despite West Bend’s argument to the contrary, West Bend’s insurance policy does not contain an excess “other insurance” clause applicable to Northern Builders. The first sentence in West Bend’s AI Endorsement states that “[t]his insurance is excess over: Any other valid and collectible insurance available to the additional insured whether primary, excess, contingent or any other basis unless a written contract specifically requires that this insurance be either primary or primary and non-contributing.” This first sentence addresses when the West Bend policy will be excess insurance coverage available to Northern Builders as an additional insured. There exists a contract between Northern Builders and Arlington that requires Arlington to name Northern Builders as an additional insured and requires that the coverage be primary. The second sentence in West Bend’s AI Endorsement states that “[w]here required by written contract, we will consider any other

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insurance maintained by the additional insured for injury or damage covered by this endorsement to be excess and non-contributing with this insurance.” This sentence is not applicable to the instant situation as there is no insurance policy at issue which Northern Builders maintained for itself. West Bend argues that the first and second sentence of its AI Endorsement cannot be read separately and must be read together. When this is done, West Bend in its appellate brief argues that the two sentences together mean that “where a written contract requires primary coverage to an additional insured, West Bend’s policy would only provide primary coverage with respect to insurance ‘maintained by’ the additional insured (i.e.. Northern Builders’ own policy).” However, when courts construe an insurance policy, “the policy must be construed as a whole, giving effect to every provision.” *West American Insurance Co. v. Yorkville National Bank*, 238 Ill. 2d 177, 185 (2010).

¶ 25 Additionally, our supreme court has instructed that “[w]hen construing the language of an insurance policy, [courts] must assume that every provision was intended to serve a purpose * * *.” *Founders Insurance Co. v. Munoz*, 237 Ill. 2d 424, 433 (2010). If we were to accept West Bend’s interpretation of its AI Endorsement, we would need to ignore the language in the first sentence of the “other insurance” clause. However, the first and the second sentences of West Bend’s AI Endorsement clearly and unambiguously serve different circumstances. The first sentence describes when West Bend’s coverage is excess and when it is primary. The second sentence describes a situation when insurance maintained by Northern Builders is at issue, which does not apply to the dispute at issue in the instant case. We cannot rule that West Bend’s policy as applied to Northern Builders is excess coverage, as it has invited us to do, without ignoring the first sentence of the endorsement. We cannot interpret a policy of insurance in such a way that terms are either ignored

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or rendered meaningless. *Cincinnati Insurance Co. v. Gateway Construction Co.*, 372 Ill. App. 3d 148, 152 (2007). Under the terms of both the contract between Northern Builders and Arlington and the insurance policy issued to Arlington by West Bend, the coverage provided to Northern Builders under the West Bend policy is primary coverage. We agree with the part of the circuit court's ruling that West Bend's insurance policy provides primary coverage for Northern Builders as an additional insured.

¶ 26 Navigators insurance policy also contains two parts to its "other insurance" clause in its AI endorsement. The first sentence of Navigators' AI Endorsement reads that "[w]ith respect to a policy of insurance issued to the additional insured hereunder as a *named insured*, this insurance is primary and non-contributory." (emphasis in original). Navigators argues that this language means it will apply its policy as primary and non-contributory only when a policy is involved under which Northern Builders is the named insured and not as an additional insured. The second sentence of Navigators' AI Endorsement reads that "[w]ith respect to other policies of insurance under which the additional insured hereunder qualifies as an additional insured, this insurance is excess." Navigators argues that this sentence dictates that it will apply its policy as excess coverage when there exists other insurance for which Northern Builders qualifies as an additional insured. It further argues that because Northern Builders qualifies as an additional insured under the West Bend insurance policy, the Navigators insurance policy is excess insurance coverage for Northern Builders.

¶ 27 At this point we should note the differences between primary insurance coverage policies and excess insurance coverage policies. Primary policies and excess policies are clearly distinct and serve different purposes which is the reason contractors many times insist on primary coverage in

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their contracts with subcontractors. Northern Builders and Arlington both insisted that they be provided with primary insurance coverage for work performed by Weldex in the contracts involved in this case. A “true” excess insurance policy only exists as part of an overall insurance package and provides a secondary level of coverage to protect the insured where a judgment or settlement exceeds the primary policy’s limits of liability. *Kajima Construction Services, Inc. v. St Paul Fire & Marine Insurance Co.*, 227 Ill. 2d 102, 114 (2007). An excess policy will not be triggered until the limits of the primary insurance coverage are exhausted. Neither the West Bend nor the Navigators’ policies are true excess policies. They are both primary policies with “other insurance” provisions that contain excess clauses. Both West Bend and Navigators’ policies were written as primary policies, not excess policies. Both of the insurance policies had underlying contracts requiring that they provide primary insurance coverage to Northern Builders. Pursuant to the contract between Arlington and Weldex, Weldex was required to procure primary insurance coverage naming the general contractor, Northern Builders, as an additional insured and that “such insurance must be primary and non-contributory coverage.” We hold that this is exactly what the parties intended and that Navigators’ insurance policy issued to Weldex provides primary coverage to Northern Builders. Despite Navigators’ argument to the contrary, West Bend submits that *River Village I, LLC v. Central Insurance Companies*, 396 Ill. App. 3d 480 (2009) has limited application to the instant case. The *River Village I* court held that if the written contract upon which insurance coverage is based is silent as to whether the insurance policy’s coverage is primary or excess and the insurance policy has a provision that the coverage is excess unless a written agreement specifically required it to be primary, then the coverage would be deemed excess. From the agreement between Arlington

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and Weldex, it is clear that the parties intended the Navigators' policy to be primary for Northern Builders since the contract required Weldex to provide insurance coverage to Northern Builders and the contract specified that the coverage be primary. See *Bieda v. Carson International*, 278 Ill. App. 3d 510, 511-12 (1996). Neither the West Bend policy issued to Arlington nor the Navigators' policy issued to Weldex are true excess policies. They are both primary policies as applied to Northern Builders with "other insurance" provisions that contain certain clauses that together with the underlying contracts between the parties provide concurrent primary coverage to Northern Builders.

¶ 28 We are faced with two primary insurance policies that contain similar "other insurance" provisions, specifically excess clauses. We must attempt to reconcile "other insurance" clauses whenever possible. *Ohio Casualty Insurance Co. v. Oak Builders, Inc.* 373 Ill. App. 3d 997, 1002 (2007). When faced with two primary policies that contain similar "other insurance" provisions, specifically, excess clauses, the policies are mutually repugnant and incompatible. *Id.* at 1002. The *Oak Builders* court had considered two insurance policies that both contained "other insurance" provisions with excess clauses. One of the excess clauses provided that the insurance was excess over "[a]ny other primary insurance available to you covering liability for damages arising out of the premises or operations for which you have been added as an additional insured by attachment or endorsement." The other excess clause provided that "[a]ny coverage provided hereunder shall be excess over any other valid and collectible insurance available to [the insured] whether primary, excess, contingent or on any other basis unless a contract specifically requires that this insurance be primary or you request that it apply on a primary basis." The court held that since both of the policies provided primary coverage and contained "other insurance" clauses with excess clauses, the

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two excess clauses cancelled each other out and both insurers would share the costs in the underlying lawsuit. *Id.* at 1002-03.

¶ 29 Here, similar to the *Oak Builders* case, both the West Bend and Navigators primary policies contain “other insurance” provisions with excess clauses. The excess clauses are similar in that each clause provides that when any other insurance is available, the policy applies as excess. Therefore, as in *Oak Builders*, we are confronted with two excess clauses that are mutually repugnant and incompatible and must cancel each other out.

¶ 30 Since the excess clauses cancel each other out, both West Bend's and Navigators' policies should share the costs of defending and indemnifying Northern Builders regarding the Beuder lawsuit.

¶ 31 C. The “Targeted Tender” Rule Is Applicable

¶ 32 West Bend argues that because Northern Builders exercised its “targeted tender” rights to select the insurance coverage provided by both Navigators and West Bend as its primary coverage, the language of the policies should be ignored. *John Burns Construction Co. v. Indiana Insurance Co.*, 189 Ill. 2d 570 (2000). However, as we have determined, *supra*, the two insurance policies involved are written on the same level as primary policies for Northern Builders. A “targeted tender” is effective when the policies are on the same level. *River Village I, LLC v. Hardleysville Lake State Insurance Co.*, 396 Ill. App. 3d 480, 491-92 (2009); *State Automobile Mutual Insurance Co. v. Habitat Construction Co.*, 377 Ill. App. 3d 281, 293 (2007).

¶ 33 For the above reasons, Northern Builders' targeted tender of the defense of the Beuder lawsuit to both West Bend and Navigators was effective.

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¶ 34

V. CONCLUSION

¶ 35 For the foregoing reasons, the judgment of the circuit court granting plaintiff's motion for summary judgment and denying defendants' motion for summary judgment is reversed.

¶ 36 Reversed.